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AUTHOR	Koerner, Thomas, Jr.
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ABSTRACT

In the last few years a variety of questions have arisen in the school context concerning the legal rights of persons seeking to record conversations. Guidance concerning the law governing these situations is based on the following conclusions: (1) neither the common law nor any federal law generally prohibits the tape recording of conversations to which one is a party; (2) however, 14 states have enacted statutes that require all parties to consent to the recording of conversations prior to so doing. In general, because of varying federal and state legislation and a paucity of court decisions, the law governing the recording of conversations is in considerable flux, and school principals desiring to record conversations in school without the consent or knowledge of all parties involved must proceed with considerable caution. This is especially true when these conversations are conducted on the telephone. Face-to-face conversations probably can be recorded without the consent or even knowledge of all parties in those states with one-party statutes in force or where no applicable statute exists. Even in these states, however, the use of recordings will probably be limited to the private refreshing of recollection and should not be released to third parties without careful consideration of their content. (MLF)

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A Legal Memorandum

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USE OF AUDIOTAPE RECORDERS IN SCHOOLS

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New technology presents new opportunities. However, it can also create new problems and these problems often have legal ramifications. This has certainly been the case with the new technology for recording conversations. In the last few years a variety of questions have arisen in the school context concerning the legal rights of persons seeking to make such recordings. This Legal Memorandum will attempt to provide some guidance concerning the law governing these situations.

Introduction and Background

The roots of the common law that apply to the issue of recording conversations are varied and go back quite a long way. In some cases, these roots predate the invention of the modern tape recorder.

Complicating the issue is the enactment in recent years of state and federal laws that have some application to the issue although not as much as some people -- lawyers and laymen alike -- may think.

In addition, there is very little by way of court decisions on sound recording within the school context.

Primary Legal Considerations

While questions may arise about the potential interference with property rights that would be involved in recording public remarks of a speaker, such as a lecture delivered at a school assembly, the questions usually raised by principals and other administrators focus on private conversations between themselves and other employees, particularly teachers; between themselves and students or their parents; and occasionally between principals and their superiors.

In most of these situations, the person planning to record the conversation makes his or her intent known in advance. The issue is whether or not the recording of the conversation is, in some way, interfering with the privacy of one of the participants if that person refuses to consent to the recording.

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To avoid possible objection, some people will record a conversation surreptitiously. This raises other questions. Again, the interest involved is perceived as one of personal privacy, but the recording is seen by some as more serious because it is done without notice to, or the consent of, other participants to the conversation.

The basis for these concerns, especially in the case of surreptitious recordings, grows out of the historic disapproval both in law and morality against "eavesdropping" or listening to the conversation of others without their knowledge. The objection is independent of whether or not the conversation is communicated to a third party who is not present, or whether the content of the conversation would necessarily be harmful if so communicated. The act of communicating the information is the subject of other legal concerns expressed in the law of defamation, or interference with contractual or other rights.

The Right of Privacy

The "right of privacy" was first identified as a separate legal right in a law review article written by Supreme Court Justices Warren and Brandeis in 1890.[1] The Supreme Court of the state of Georgia was the first such court to recognize the right in 1905.[2] It has become an accepted basis for a wide variety of claims, from the right to have an abortion to preventing the use of one's name or likeness in connection with advertising or other business promotions. These instances have little relation to schools and school administration, but the concept of a legally protected right of privacy based on newly created legal doctrine at the turn of the century has led to creative application to a growing number of situations, and some have involved schools and their personnel.[3]

It has been estimated that about three-quarters of all United States jurisdictions have accepted the right of privacy as a basis for a civil claim for tortious injury, and many state legislatures and the Congress have seen fit to recognize it by legislative enactment.[4]

Despite the widespread growth of the concept of privacy and the legal right to its protection, it has been applied only sparingly to communication, at least in civil cases. Until recently the courts have assumed that an individual's rights were adequately protected by the law of defamation. That law requires, however, that a conversation not only be overheard, but also be communicated to a third party, and be false.[5]

One of the first cases in which the mere overhearing of a conversation was successfully claimed to be a tortious interference with a legal right involved a hospital patient whose conversations were overheard by means of a microphone concealed in her room. This occurred in 1939.[6]

While no such cases have been reported involving school personnel, they seem to be proliferating in other contexts with the rapid improvement of technological means for both receiving and recording conversations. The greatest number of cases on the issue have been criminal in nature, where the issue was whether or not recorded conversations were admissible as evidence.

This has been the case particularly in regard to surreptitious recording of conversations by law enforcement officers. The key decision in this area is undoubtedly Katz v. United States,[7] decided by the United States Supreme Court in 1967. In this landmark decision, the Court cited earlier rulings that the protection of privacy under the Fourth Amendment did not require actual physical intrusion into the home or other place in which an individual was located.

More specifically, it ruled that a person making a telephone call from a public booth had a reasonable expectation of privacy in making such a call, and that the government could not use electronic listening and recording devices to intercept that call without "appropriate safeguards."

Because the constitutionality of an act usually requires that the defendant either be a government entity or its agent, there have been few situations in which the constitutionality of the recording of conversations has been dealt with in civil cases. One of the few was Holmes v. Finney, a federal appeals court decision in which employees of a public housing authority taped discussions with management in the course of wage negotiations.

The court held that recording of a conversation by one party to it, even when done surreptitiously, did not violate any constitutional right of another party to the conversation. In reaching this decision, the Court cited the Katz case, and other criminal cases involving eavesdropping, but concluded that the employees had not violated the due process constitutional rights of either their employers or supervisors.[8]

In another civil case a federal appellate court ruled that no right of privacy was violated when certain boisterous comments of a prisoner were recorded for subsequent public broadcast by a radio station.[9]

Wiretapping

There has been rapid growth in the technology for intercepting conversations by means other than standard microphones in the last 20 years. Law enforcement organizations in particular have made use of this technology, especially for recording telephone conversations. All of this has been duly reported in the public press and dramatized in films and on television. Wiretapping is a well-known term. Most citizens are aware that it is not a practice condoned by the courts if undertaken -- without proper authorization -- by law enforcement officers. It is probably understandable, then, that the public assumes the law applies equally to interception of communications by private individuals. This assumption is not, however, completely correct.

The entire theory of the criminal cases involving wiretapping derives from claims of invasion of constitutional rights by government. As indicated above this has no applicability to the actions of private individuals. As early as the 1930s, however, some courts were willing to regard private wiretapping as an invasion of a basic right of privacy for which civil damages could be awarded, even where there was no evidence of any publication of the intercepted conversation.

In a very early case,[10] the Court said, in part:

> Wiretapping is akin to eavesdropping, which was an indictable offense at common law, and while it has not been made a punishable offense by statute in this state, we conclude that the facts alleged...constitute a wrong done...for which the law affords a remedy by an action for damages.

Note that, as the court observed, eavesdropping was an "indictable offense" -- that is, a crime at common law, and not the basis for a civil suit for damages. Nevertheless, the approach taken in this case has been followed in state and federal legislation which prohibits private wiretapping.

Federal Legislation

The Omnibus Crime Control and Safe Streets Act of 1968 [11] provides:

> No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

Interception of oral communication has been interpreted under the federal Crime Control statute to mean eavesdropping, or the surreptitious recording of conversations of which the person doing the recording is not a part. If there is consent, even by one of the parties to a conversation, recording of the conversation is not a violation of the statute unless the information secured is used for the purpose of committing a "tortious, criminal, or any injurious act." The statute provides both civil and criminal penalties for its violation.

"Oral communication" is defined in the statute as any utterance "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." The statute has, therefore, incorporated the approach taken by the Supreme Court in the Katz case mentioned above.

Even where the wiretapping is performed by a person or organization who is not a party to a conversation, it is not completely forbidden under the federal act if the practice has a proper purpose and if the surveillance policy is one of which persons concerned have been generally informed. The most common example of this is the practice of telephone company supervisors checking on operator performance by listening to conversations with their customers.

Thus, when there is no reasonable expectation of privacy, the recording of a conversation by one of the parties is not prohibited by the federal law, whether those conversations take place over the telephone or face to face, even though the other party or parties are not informed of the recording.

For example, a federal court has upheld the authority of FBI agents to monitor telephone conversations between a government contractor and government employees, with the consent of the contractor, in order to obtain information regarding alleged improprieties by the employees.[12] There was also no invasion of privacy under federal or California law when a franchisor recorded conversations with a disgruntled franchisee to establish attempted extortion.[13] Further, the invasion of privacy suit of an employer whose employee had recorded a conversation with a supervisor in which the employee was fired was dismissed.[14]

State Legislation

Thirty-eight states and the District of Columbia have enacted statutes concerning the recording of oral conversations. Twenty-five of these states and the District of Columbia have either written their laws to permit such recording or have had them so interpreted by their courts, where at least one of the parties to the conversation has consented to the recording. These jurisdictions are:

Alabama	Illinois	New York
Alaska	Iowa	North Dakota
Arizona	Kentucky	Oklahoma
Colorado	Maine	Texas
Connecticut	Minnesota	Utah
D. C.	Nebraska	Virginia
Hawaii	New Jersey	West Virginia
Idaho	New Mexico	Wisconsin
		Wyoming

Fourteen states that have enacted statutes concerning the interception of oral conversations have either specifically stated such interception is impermissible unless all parties consent to it, or have had the statutes so interpreted. These states are:

California	Louisiana	New Hampshire
Delaware	Maryland	Oregon
Florida	Massachusetts	Pennsylvania
Georgia	Michigan	Washington
Kansas	Montana	

The remaining 11 states have enacted no statutes specifically dealing with interception of oral conversations. Litigation in these states is presumably governed by the federal act, which allows such interception where one party consents to it. These states are:

Arkansas	North Carolina	Tennessee
Indiana	Rhode Island	Vermont
Mississippi	South Carolina	
Missouri	South Dakota	
Nevada		

Other Possible Legal Ramifications

Even if no state or federal statute appears to apply, attempts to record conversations of persons with whom one is having a conversation may still have legal ramifications if the other party objects or if it is done without their knowledge. In the area of private employment, for example, there is some basis for employees to contend that recording of conversations is an "unfair labor practice" under the terms of the National Labor Relations Act (29 US Code 158).

While there are no cases which expressly deal with sound recording, some cases have focused on other methods by which an employer electronically observed his employees. In NLRB v. Rybold Heater Co.,[15] for example, an employer who used a motion picture camera to record certain union activities was found to have committed an unfair labor practice. It must be noted, however, that the basis for the decision was a finding that the purpose and intent of the filming was to drive away and halt union activities. That kind of rationale seems to be the basis for objection to employee surveillance of any kind.

In two other recent proceedings involving collective bargaining, the National Labor Relations Board ruled that the informal and honest dialog necessary to labor negotiations would be inhibited by the presence of recording devices. The Board therefore concluded that the insistence upon the use of such devices by one party constituted a failure to bargain in good faith.[16]

Public school negotiations are not covered by the National Labor Relations Act, but in many states they are covered by similar state legislation, and a similar view might therefore apply.

As indicated earlier in this Memorandum, it is important to note the difference between legal prohibition of tape recording per se and the use to which such a recording may be put. Thus, even if the making of such a recording is perfectly legal, its use may be a tortious activity subject to recovery of damages if the statements made on the recording are themselves false, harmful, and made with a malicious intent to harm someone. In such a case, however, it is not the recording process that is actionable, but the subsequent publication of the harmful contents of the recording.

Similarly, the recording of a conversation without the consent or knowledge of one of the parties may not be actionable, but the introduction of the recording into a legal proceeding as evidence may not be permissible unless the party seeking to use the recording can show that the recording is authentic, has not been tampered with, and was made at the time and place alleged.

Conclusions

1. Neither the common law nor any federal law generally prohibits the tape recording of conversations to which one is a party, whether or not other parties to the conversation give their consent, or are even put on notice that the recording is to be made.

2. Fourteen states have enacted statutes that require all parties to consent to the recording of conversations prior to so doing. In these states, failure to secure such consent, regardless of the use to which the recording is put, may be the basis for civil suit or criminal prosecution.

3. In some circumstances, such as labor negotiations, the recording of discussions without the concurrence of both parties, or the refusal to conduct negotiations without making a recording of them may constitute an impermissible labor practice under state or federal labor laws.

4. While the mere recording of a conversation may not constitute a violation of the law, publication of the conversation to third parties may be legally actionable if such publication defames someone, casts their reputation in a "false light," or otherwise interferes with some property interest such as an employment opportunity or contract. Use of tape recordings in judicial proceedings may also be excludable on the basis of technical objections under rules of evidence.

5. In general, because of varying federal and state legislation and a paucity of court decisions, the law governing the recording of conversations is in considerable flux, and school principals desiring to record conversations in school without the consent or knowledge of all parties involved must proceed with considerable caution. This is especially true when these conversations are conducted on the telephone.

Face-to-face conversations probably can be recorded without the consent or even knowledge of all parties in those states with one-party statutes in force or where no applicable statute exists. Even in these states, however, the use of recordings will probably be limited to the private refreshing of recollection and should not be released to third parties without careful consideration of their content.

Footnotes

1. The Right of Privacy, 4 Harv. L. Rev. 193 (1890)

2. Pavesich v. New England Life Ins. Co. 50 S.E. 68 (Ga. 1905)

3. One such area has been that concerning the physical testing of bodily fluids such as blood and urine. The particular issue of such tests conducted by school authorities to discover whether a student or school employee has used illicit drugs was the subject of our last Legal Memorandum, dated October, 1987.

4. See Sec. 9.6 The Law of Torts, by Harper, James & Ivey (2d ed. 1986) pp 641-643

5. See Legal Memorandum, "Defamation: A Worry for All Seasons", December, 1982

6. McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E. 2d 810 (Ga. Ct. App.(1939)

7. 339 U. S. 347 (1967)

8. 632 F.2d 150 (10th Cir. 1980)

9. Holman v. Central Arkansas Broadcasting Co, 610 F.2d 542 (8th Cir. 1979)

10. Rhodes v. Graham, 37 S.W. 2d 46 (1931); see also McDaniel v. Atlanta Coca-Cola Bottling Co, supra, Note 6.

11. 18 U.S. Code 2511 (1982)

12. Wissner v. U.S. 176 Ct. Cl. 1372, cert denied 386 U.S. 981 (1967)

13. Mock v. Telefon Communications Corp., 589 F.2d 959 (1978)

14. Barr v. Arco Chemical Corp. 529 F. Supp 1277 (S.D. Tex 1982) (construing both Texas and Pennsylvania law.)

15. 408 F.2d 888 (6th Cir 1969) See also NLRB v. Mueller Brass Co., 509 F.2d 704 (5th Cir. 1975)

16. Pennsylvania Telephone Guild, 277 NLRB No. 55, 120 LRRM 1257 (1985) and Hutchinson Fruit Co. 277 NLRB No. 54, 120 LRRM 1258 (1985)

This Legal Memorandum was written with the assistance of Thomas Koerner, Jr., an attorney in the District of Columbia.

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